Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

§

TIMOTHY G. FERGASON,
Petitioner,

vs.

GARY JOHNSON, DIRECTOR,
Texas Department of Criminal Justice
Institutional Division,
Respondent.

§

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

§

PETITION FOR A WRIT OF CERTIORARI

§

Timothy G. Fergason
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67 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the court of appeals erred in affirming the district court's decision not to extend the federal "mailbox rule" to the filing of postconviction applications in state court thereby holding petitioner had failed to make a credible showing that the district court erred in dismissing his petition as time-barred.

2. Whether one can be convicted of an offense that did not exist when he was arrested, as it had not yet been enacted and the instant statute at the time of the arrest repealed.

3. Whether the district court erred in compelling petitioner to return to state court to exhaust one (1) issue complained not to be exhausted out of the five (5) presented, when no remedy existed to exhaust because of a state procedural bar.

PARTIES TO THE PROCEEDING

The parties to this proceeding are contained in the caption of the case. Mr. Fergason is not a corporate entity. Accordingly, Rule 29.6 is not applicable to this Petition.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Timothy G. Fergason respectfully petitions this Court for a writ of certiorari to review the judgement and opinion of the United States Court of Appeals for the Fifth Circuit in this case.

§

OPINIONS BELOW

Neither the opinion of the district court nor the opinion of the Court of Appeals were reported. The judgement of the district court is attached as Appendix B. The unpublished denial of the application for certificate of appealability and motion for rehearing on same are attached as Appendices A and E, respectively. The unpublished opinion of the highest state court to review this case is attached as Appendix C. The trial court's opinion is attached as Appendix D.

JURISDICTION

The judgement of the Fifth Circuit Court of Appeals was entered on September 02, 1999. The Fifth Circuit Court of Appeals denied Petitioner's Motion for Rehearing on September 29, 1999. Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254 (1).

———§———

STATUTORY PROVISIONS INVOLVED

This petition involves the federal mailbox rule and its application to the limitations period of the Antiterrorism and Effective Death Penalty Act only in federal applications for habeas relief and not in state applications. It also involves a violation of the Ex Post Facto Clause by the state in applying a recently enacted statute retroactively, and finally, whether a petitioner should be compelled to return to state court to further exhaust when no remedy exists.

STATEMENT OF THE CASE

1. Basis for jurisdiction in the Court of First Instance

The jurisdiction for the Eastern District Court of Texas was pursuant to 28 U.S.C. §§ 2254, 2241. The jurisdiction of the Court of Appeals for the Fifth Circuit was pursuant to 28 U.S.C. § 2253.

2. Relevant Factual Background

Petitioner, Timothy G. Fergason, is a prisoner in the State of Texas who filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner was convicted of the felony offense of driving under the influence of alcohol ("DWI") with three prior convictions used for enhancement of punishment. Petitioner had been previously convicted in January of 1999, in the same court, for the same offense, before the same judge, represented by the same attorney, with the exact same prior convictions relied upon by the state to enhance punishment. In this trial he was convicted of violating art. 6701L-01, of

the Texas Civil Statute ("VATCS") and assessed a sixteen year term in prison. On the day of trial, the indictment had to be amended, because the third paragraph alleged an "impossible" date as the final conviction date. The significance of this, lies in the fact the exact same indictment was used in the instant case. However, the thing that divested the trial court of jurisdiction here was, that in the first case he was arrested for DWI on July 19,1994, and on December 23,1995 in the second case. He was charged under 6701L-01 in both cases, even though 6701L-01 was repealed on September 1,1994.

2. Procedural History

On May 22,1996, a jury sentenced Petitioner to eighteen (18) years confinement. Petitioner did not appeal but filed three state applications for habeas relief. On October 30,1998, he filed his federal application complaining of a fudamentally defective indictment and ineffective assistance of counsel. On December 21,1998, Respondent filed a motion to dismiss pursuant

to the statute of limitations bar in 28 U.-S.C. §2244(d). Respondent's motion was gr-anted by the district judge upon adopting the magistrates recommendation. Petitioner file an application for COA to the district court, who denied it. He then proceeded to ask for COA from the Fifth Circuit Court of Appeals, who denied it on September 2,1999. A timely motion for rehearing was filed,and it was denied on September 29,1999.

OPINIONS BELOW

Federal Courts

The opinion of the United States Court of Appeals for the Fifth Circuit is attached as Appendix A, and is unpublished.

The opinion of the United States district court appears at Appendix B, and is unpub-lished.

The opinion of the United States Court of Appeals for the Fifth Circuit is attached as Appendix E, (Rehearing COA)

STATE Courts

The opinion of the Texas Court of Criminal Appeals is attached as Appendix C, and is

unpublished. The opinion of the 114th district court of Smith county, Texas, is attached at Appendix D.

REASONS FOR GRANTING THE PETITION

There is currently a split as to the petitions for writ of habeas corpus are being handled in relation to the federal "Mailbox rule" extended from this Court's holding in **Houston v. Lack, 487 U.S. 266, 108 S.Ct. 2379, 101 LEd2d 245 (1988).**

In the instant case, petitioner's writ was denied as time-barred pursuant to 28 U.S.C.§2244(d). Petitioner argues that had the federal mailbox rule been extended to his state application, as it is to federal habeas petitions this would not have occured.

In this case, petitioner's pro se brief should have been construed liberally in construction. **Humphrey v. Cain, 120 F3d 526, 530 n. 2 (5th Cir.1997).** First, the district court determined erroniously that two of the three state applications filed were not properly filed and therefore were not available for tolling the AEDPA. On COA the Fifth Circuit held the district court erred in this holding and deemed all the state

applications filed by the petitioner as "properly filed" and unavailable to toll the limitation period. It then denied the COA because it found petitioner had failed to make a credible showing that the district court erred in dismissing his petition as time-barred.

1. The Conflict Regarding the Timeliness of the Petition under §2254 Centers on a Differing Opinion Between the Parties as to when Exactly the Three State Applications were Filed

In its motion to dismiss, the Respondent argued that the dates on petitioners certificates of service, were not in fact the dates said applications were filed.

Respondent contends that the first application was filed on October 29,1996. Petitioner offered proof that it was October 6,1996. (See Appendix F) Next, it was alleged that the second application was filed on April 14,1997, petitioner alleged that it was filed on April 7,1997. Finally, it was alleged that the third application was filed on November 24,1997, with the petitioner alleging November 29,1997.

Petitioner was convicted on May 22,1996

and the date of final conviction therefore is June 21, 1996. In calculating the limitation period of the AEDPA, we must begin by calculating the amount of time that elapsed from the final conviction date, until the first state application was filed.

THE RUNNING AND TOLLING OF THE AEDPA LIMITATION PERIOD (365 DAYS)

Date alleged by Respondent/Petioner of Filing

1st. Application

October 30, 1996 / October 06, 1996

Date of Disposition:

January 29, 1997; Denied By Texas Court of Criminal Appeals

Running and Tolling of AEDPA:

The limitation period ran from June 21, 1996, until October 30, 1996, approximately 131 days; or until October 06, 1996, approximately 107 days as the Petitioner alleges. 365 days minus 131 days, equals 234 days before tolling; or 258 days before tolling according to Petitioner.

2nd Application

April 14, 1997 / April 07, 1997

Date of Disposition:

September 10, 1997; Denied by Texas Court of Criminal Appeals

Running and Tolling of AEDPA:

The limitations period began to toll on the date the first application was submitted or filed depending on either October 30, 1996, as alleged by Respondent or October 06, 1996, as alleged by the Petitioner, until said application was denied. By Respondent's calculations that would be that from the date of final conviction (June22,1996) until October 30, 1996, the period ran 131 days leaving 234 days left in the limitation period. Petitioner contends it leaves 258 days. Both agree it tolled until the date of the second application. However, there is a seven day discrepancy between parties on that date. Respondent states it ran from January 10, 1997, until April 14, 1997; Petitioner contends it ran until April 07, 1997. Both agree it tolled until September 10, 1997, the date it was denied.

3rd Application:

November 24, 1997 / November 29, 1997

Date of Disposition:

July 29, 1998; Denied by Texas Court of Criminal Appeals

Running and Tolling of AEDPA:

The limitations period began to run again from the date the second application was denied (September 10,1997) until the third was filed according to Respondent on November 24, 1997; or November 29, 1997 according to Petitioner. Both agree it tolled until the final disposition on July 29, 1998, when the third application was denied.

Synopsis:

Respondent Claims:

First application filed October 29, 1996, 130 days after final conviction date. Then claims period tolled until first application denied on January 29, 1997. (365 days minus 130 days equals 235 days).Next, the period ran until the second application was filed on April 14, 1997. It then tolled until it was denied on September 10, 1997 (235 days minus 75 days equals 160 days). Finally, the period ran until the third application was filed on November 24, 1997. It then tolled until being denied on July 29, 1998 (160 days minus 75 days equals 85 days). The §2254 application was filed on October 30, 1998, so the

limitations period ran from the date the third application was denied (July29,1998) for ninety-three days until the §2254 was filed. (85 days minus 93 days equals a deficit of -8 days) the reason that Respondent contends Petitioner is time-barred pursuant to 28 U.S.C. §2244(d).

Petitioner Claims

First application filed October 06, 1996, (See Appendix F) 107 days after the final conviction date. He claims period tolled until the first application was denied on January 29, 1997. (365 days minus 107 days equals 258 days remaining) Next, he claims that the limitation period ran until the second application was filed on April 07, 1997. It told until it was denied on September 10, 1997. (258 days minus 68 days equals 190 days remaining) Finally, the period ran until the third application was filed on November 29, 1997. It then tolled until being denied on July 29, 1998. (190 days minus 75 days equals 115 days remaining) The §2254 application was filed on October 30, 1998, so the limitations period ran from the date the third application was denied (July29, 1998) for ninety-three days until the §2254 was filed. (115 days minus 93 days equals 22days left remaining in the limitations period)

Therefore, petitioner maintains he timely filed his §2254 application.

The Court of Appeals decided against the Respondent's first assertion for dismissal in that it found petitioner had properly filed all three state applications, so all were available for tolling the limitations period. See **Villegas v. Johnson**, ___F3d___, **1999 WL 595157 (5th Cir.Aug. 9, 1999)**(Holding that a "properly filed application" for §2254(d)(2) purposes is one that conforms with a state's applicable procedural requirements).

2. Credible Showing that District Court Erred in Dismissing Petition as Time-barred

Petitioner asks this Court to consider how it's previous holding in **Houston v. Lack**, **487 U.S. 266, 108 S.Ct. 2379, 101 LEd 2d 245 (1988)**, has been extended beyond the original holding by several different Circuits; In **Hernandez v. Aldridge**, **902 F2d 386, (5th Cir.1990)**, applying the mailbox rule to pro se appeal notice; similarly in **Cooper v. Brookshire**, **70 F3d 377, 379 (5th Cir.1995)**, wherein the Court of Appeals ex-

tended the mailbox rule to pro se litigant's filing §1983 applications.

In **Houston** the Court recognized that "[u]nskilled in law, unaided by counsel, and unable to leave the prison, a pro se prisoner's control over the processing of his notice necessarily ceases as soon as he hands it over[.]" This was the case before the strict limitations of the AEDPA were implimented in 1996, when only at that time was the notice of appeal so narrowly cast. At the time of the Court's holding in **Houston** habeas corpus applications were not held to such a tight and unforgiving time schedule. Today however, this has obviosly changed. Now, one day can eliminate an application from being timely filed and not time-barred. Because of this, we ask the Court to revisit its holding in **Houston** and determine if under present circumstances, it should be extended not only to all the above circumstances and federal applications (See **Spotville v. Cain, 149 F3d 374 (5th. Cir.1998)**) but also state applications for habeas corpus relief, as the same circumstances that were use to justify earlier extensions of **Houston** are necessarily applicable in the instance of the state applications.(See **Burns v. Morton, 134 F3d 109 (3rd Cir.1998)**).

In these cases, the court's have expressed concern over the pro se litigant's lack of control over the filing of legal documents, as limitation periods that have come about are stringent and narrow in nature, unfairly prejudicing those who must rely upon others to timely forward thier pleadings. Petitioner initiated his proceedings by tendering to prison officials for mailing, his habeas petition pursuant to the AEDPA statutes, approximately three months after the limitations grace period began. A rule that grants that is applied only to federal petitions and not state applications, is contrary to what has admittedly been held by numerous Circuit's traditional disposition of lieniency toward pro se litigants. See **Gallegos v. Louisiana Code of Criminal Procedures Art. 658, 858 F2d 1091, 1092 (5th Cir.1988)**(Holding that lieniency should be accorded to pro se litigants when the defect is merely procedural and there are potential grounds for relief.): **Moawad v. Childs, 673 F2d 850, 851, (5th Cir.1982)**(Holding that "[a] pro se complaint. ..should not be dismissed unless it appears that the plaintiff can prove no set of facts which would entitle him to relief."). Herein, petitioner has shown that the state's allegations of when the first state application was filed is wrong. (See Appendix F)

In the Fifth Circuits holding in **Spot ville** id., it held, inter alia, " a pro se prisoner's habeas petition is filed, for purposes of determining the applicability of the AEDPA when he delivers the papers to prison authorities for mailing," they did not specify state or federal application.

Since the Circuit's have held that the filing of federal habeas petitions are so time-critical they require the extension of the mailbox rule to their application. It is only fair and equitable as those same standards required for federal habeas applications apply to state habeas applications, the mailbox rule should be extended to state applications as well.

3. Can a Court devoid of jurisdiction have the power for adjudication

Petitioner complains he was convicted in a court devoid of jurisdiction, as the charging instrument alleged an offense supported by a repealed statute.

On December 23, 1995, petitioner was arrested for the felony offense of driving while intoxicated

("DWI") (See Appendix G) pursuant to Article 6701L-01, of the Texas Code of Civil Statutes ("VATCS") as indicated by the indictment. On September 1, 1994, the Texas Legislature repealed Article 6701L-01, VATCS, and moved the entire DWI law of Texas to the Texas Penal Code, ("VTPC") Article 49.04.

By coincidence, petitioner had been previously arrested on July 19, 1994, in the same county, for the same offense (DWI), before the same judge, represented by the same counsel, for violating the DWI statute Art. 6701L-01, VATCS, as indicated by the indictment in that cause.(See Appendix H)

Now, if you compare the two indictments in these causes, you will see that they are almost exact duplicates, even having the same enhancement paragraphs. The problem is, in the first case he was arrested on July 19, 1994, when Art. 6701L-01, VATCS was applicable. But, in the second and instant case he was arrested on December 23, 1995, over a year after Art. 6701L-01, VATCS, was repealed and moved to the Penal Code. Therefore, when petitioner was indicted in the instant case, it was done under the authority of a statute that simply did not exist anymore, thereby divesting the trial court of

jurisdiction making the conviction void.

The Fifth Circuit Court held: "the sufficiency of a state indictment is not a matter for habeas relief unless it can be shown the indictment is so defective that the convicting court had no jurisdiction." **Liner v. Phillips, 731 F2d 1201, 1203 (5th Cir.1984)** (quoting **Branch v. Estelle, 631 F2d 1229, 1233 (5th Cir.1980)**). In **United States v. Edrington, 726 F2d 1029, 1031 (5th Cir.1984)**, held: "although practical, not technical, considerations generally govern the validity of the charging instrument, the failure of the charging instrument to charge an offense is a jurisdictional defect that is not waived by a guilty plea."

The **Liner** court further stated, "that a claim of insufficiency of a state indictment is valid for federal habeas corpus purposes only when the indictment is so defective that under no circumstances could a valid state conviction result from facts provable there under." **id.** Quoting **Johnson v. Estelle, 704 F2d 232, 236 (5th Cir.1983).**

Petitioner claims the errors in his trial ... "not only created a possibility of prejudice, but in fact worked to his actual and

substantial disadvantage, infecting his entire trial with error(s) of constitutional dimension." See **United States v. Frady, 102 S.Ct. at 1596.** This resulted in a "fundamental unfairness" which should have compelled review regardless whether a state procedural default existed. "The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he has been charged." **In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 LEd2d 368 (1970).**

Not only was there no statute to support the offense alleged to have been violated, but in the earlier conviction the third paragraph relied upon by the state for enhancement purposes, contained a fatal variance, alleging an "impossible date" of final conviction. The state motioned on the day of trial to have that paragraph, in that indictment amended without objection from defense counsel.

The significance of this, is, that when the petitioner was indicted in the instant offense, the same third paragraph, contained the same "impossible date" alleged in the former. Even though trial counsel knew this information was incorrect, he never filed a motion to have the indictment quashed.

Again, on motion of the state, without objection of the defense, the court amended the third paragra-

-ph only this time, she interliniated the wrong date of final conviction on the face of the "stipulation to evidence" instead of the face of the charging instrument. (See Appendix I) Thus, no physical alteration of the charging instrument was ever made and the proof supporting the conviction offered by the state, did not match the evidence.

So, we have a court without jurisdiction amending the wrong instrument causing a comedy of errors resulting in an eighteen year term of confinement for the petitioner.

We ask the Court, would it be laughing? How can this happen. How can anyone be convicted of an offense that had been repealed prior to his arrest? These are serious questions, we believe are in need of serious answers.

Unfortunately, when the petitioner had diligently pursued having the merits of his claims heard, he was confounded by the uncredible showing by the state that he was time-barred pursuant to §2244(d)(2). Neither the prosecution nor the judge can alter the charge to fit the proof or vis versa. To do so would be ursurping the function

of the grand jury. See **Stirone v. United States, 361 U.S. 212, 80 S.Ct. 270, 46 LEd 2d 252 (1960); United States v. Beard, 436 F2d 1084 (5th Cir.1971);** Also see **Ex Parte Bain, 121 U.S. 1, 7 S.Ct. 781, 30 LEd2d 8-49 (1887).**

On August 8, 1997, petitioner filed his first application for habeas relief, pursuant to 28 U.S.C. §2254, in the Eastern District Court of Texas. The Honorable Harry McKee was assigned to hear the case, which was given cause no. 6:97-cv-778. A final judgement was issued on March 18, 1998, by the Honorable William Wayne Justice, U.S. District judge of the Eastern District of Texas, ordering that no relief be accorded the petitioner, dismissing the action without prejudice for failure to exhaust all state remedies. At the time of this filing the petition was considered timely filed for the purposes of the AEDPA.

The district court held petitioner had failed to exhaust his "fifth issue." Both the magistrate and district judge assured petitioner he could return to federal court after exhausting his state remedies. (See Appendix J)

Petitioner claims he should not have been forced to return to state court to exhaust his state remedy on the lone fifth issue, as no remedy existed for him to exhaust because of the procedural bar that Texas implimented concerning subsequent applications embodied in Article 11.07, §4, VTACS.

Nevertheless, petitioner returned to the state court because he had no choice. This prejudiced him in two ways; 1). He had been timely in his original §2254 before being sent back to the state, upon his return, the state pled he was time-barred and was found to be so by the district court; 2). For seven months petitioner's §2254 petition languished in the district court, only to be dismissed as a "mixed" petition. Because he was dismissed in this manner, he was unable to have the seven months the first federal application was pending available for tolling the limitation period. Also, it took the state nearly eight months to determine his third application was procedurally barred under art. 11.07,§4.

Petitioner submits pursuant to §2254 he was unreasonably required to return to state court to further exhaust the fifth issue, when in fact, none existed. The district court erred by not making a proper "availability" determination of the state remedies that petitioner could avail himself of. This resulted in a game of "judicial ping-pong"

between the state and federal jurisdictions, with the instant case used as the ball. This critically injured, prejudiced, and caused irreparable harm culminating in a procedural nightmare that prevented him from gaining the constitutionally guaranteed habeas corpus relief he deserves. See **Fay v. Noia**, 372 U.S. 391, 435, 83 S.Ct. 822, 847, 9 LEd 2d 837 (1963); **Williams v. Brantley**, 502 F2d 1383, 1385-86 (C.A.1974). Remedies must be available in state court to exhaust. **Wainwright v. Sykes**, 433 U.S. 72, 97 S.Ct. 2497, 53 LEd2d 594 (1977). "A claim not previously presented to the state's highest court would be precluded from state consideration because of the procedural bar, further exhaustion is not required. **Teague v. Lane**, 489 U.S. 288, 297-98, 109 S.Ct. 1060, 1068, 103 LEd2d 334 (1989). Here the court held, "we invoke the law's interest in finality; as well as the equitable principles that govern and define the court's discretion to excuse a pleading and procedural requirments for a petitioner who could not comply with them in exercise of reasonable care and dilligence." Due dilligence and reasonable care has been a part of petitioner's quest for his application to be heard from the begining without success. A fundamental miscarriage of justice results from the accuracy of the conviction

being unconstitutionally undermined . **477 U.S. at 539, 106 S.Ct. at 2669.** This case does not turn on whether the inclusion or exclusion of any particular evidence was denied or granted. It does however, speak to this petitioner's efforts to apprise the state courts and lower federal courts that he had been convicted of a crime that simply did not exist when he was arrested. This error is global in scope, and necessarily pervades the entire judicial process, and could not help but pervert the resulting conviction.

CONCLUSION

The standards that were employed by the implimentation of the AEDPA, has caused the limitations on when a writ of habeas corpus must be filed in order to be considered on its merits. Although no time limit exist as to applications filed in Texas per se, they are still entirely relevant and applicable to when the limitations period of the AEDPA may be tolled. Therefore, the Circuit court's have found it necessary to extend the mailbox rule to federal applica-

-tions for pro se litigants, as they must rely upon others whom they entrust their pleadings,to ensure that they are forwarded in a timely manner. In equity, if the rule is to be extended to federal applications, it is only fair it be extended to state one's as well.

Had petitioner not been erroniously time-barred, he could have had his unconstitutional conviction justly vacated, as it still should be. No citizen should be subjected to arrest, charge and conviction when the law alleged to have been violated was repealed more than a year before his arrest.

The district court erred in requiring petitioner to return to state court to exhaust state remedies that were not available to exhaust. He was timely in his first federal application and it was agreed that four of the five issues were exhausted. It was not practical or equitable to require him to return to the state court who then barred him for abuse of the writ.

The time it took the district court to time-bar petitioner and send him back to state court and them to determine him to be procedurally barred was more than a year and a half. It has now been almost four years since his conviction and petitioner still has

not had his petition heard by any court on the merits. He admits he is not trained in the law, but has been dilligent in seeking relief.

WHEREFORE, for the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-40356
USDC No. 6:98-CV-662

TIMOTHY G. FERGASON, [September 07,1999]

Petitioner-Appellant

versus

GARY L. JOHNSON, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,

Respondent-Appellee.

Appeal from the United States District Court
for the Eastern District of Texas

ORDER:

Timothy G. Fergason, Texas Prisoner # 746910, seeks a certificate of appealability ("COA") to appeal the district court's judgement dismissing his 28 U.S.C. § 2254 petition as time-barred under 28 U.S.C. § 2244(d).

The district court incorrectly determined that Fergason's second and third state habeas applications did not toll the limitations period because they

were dismissed as abusive of the writ and were therefore not "properly filed" within the meaning of § 2244(d)(2). See Villegas v. Johnson, ___F.3d___, 1999 WL 595157 (5th cir. Aug. 9, 1999) (holding that a "properly filed application" for § 2244(d)(2) purposes is one that conforms with a state's applicable procedural filing requirements).

Nevertheless, Fergason has failed to make a credible showing that the district court erred in dismissing his petition as time-barred, and COA is therefore DENIED. See 28 U.S.C. § 2253 (c) (2); Sonnier v. Johnson, 161 F.3d 941, 943 (5th Cir.1998); Coleman v. Johnson, ___F.3d___, 1999 WL 598607,*3-4 (5th Cir. Aug. 3 1999) (declining to extend the "mailbox rule" to the filing of postconviction applications in state court).

COA DENIED.

/s/ Jacques L. Wiener, Jr.

UNITED STATES CIRCUIT JUDGE

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

TIMOTHY G. FERGASON,	§	
VS.	§	CIVIL ACTION NO.6:98cv662
GARY M. JOHNSON, DIRECTOR,		[January 15, 1999]
TDCJ-ID	§	

REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE

Petitioner Timothy G. Fergason, confined in the Pack I Unit of the Texas prison system, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The petition was referred for findings of fact, conclusions of law, and recommendations for disposition.

Petitioner is in custody for Petitioner's May22, 1996, Smith county, Texas conviction of the felony offense of driving while intoxicated, with three prior convictions alleged for enhancement of punishment. On May22,1996, the jury sentenced Petitioner to eighteen years confinement. Petitioner did not appeal but filed three state applications for writ of habeas corpus.

On October 30,1998, Petitioner filed the present application for writ of habeas corpus based on a fundamentally defective indictment and ineffective assistance of counsel. On December21,1998, Respondent filed a motion to dismiss pursuant to the statute of limitations bar in 28 U.S.C.§2244(d). On December30,1998, Petitioner filed a reply. Respondent's motion asserts the following: Petitioner's first state application for writ of habeas corpus was filed on October 29,1996, and denied by the Texas Court of Criminal Appeals without written order on January29,1997. The second, filed on April 14,1997, was denied by the Texas Court of Criminal Appeals on September10,1997, for abuse of writ. The third, filed on November 24,1997, was denied by the Texas Court of Criminal Appeals on July29,1998, for abuse of writ.

Petitioner's reply asserts that Petitioner filed the first state application for writ of habeas corpus on October22,1996, the second on April7,1997, and the third on November29,1997.

28 U.S.C.§2244(d) was enacted on April24, 1996. Federal laws are to become effective

when signed into law unless Congress expressly provides an effective date. **Gazon-Peretz v. United States,** 498 U.S. 395 (1990). Congress did not expressly provide an effective date for 28 U.S.C.§2244(d); therefore, it became effective on April24,1996.

On October30,1998, Petitioner filed the present application; therefore, 28 U.S.C.§2244(d) applies. A person in custody pursuant to a state court judgement has a one-year statute of limitations for filing an application for writ of habeas corpus. 28 U.S.C.§2244(d)(1). The statute of limitations is triggered by the latest of the following:

(A) the date the judgement became final by conclusion of direct review or expiration of time for seeking direct review;

(B) the date an "impediment to filing the application is removed";

(C) the date the Supreme Court initially recognized the constitutional right asserted; or

(D) the date the factual predicate of the claim or claims "could have been discovered through the exercise of due dilligence."

id.

Petitioner does not allege an impediment to filing; therefore, (B) is inapplicable. Petitioner does not assert a newly recognized constitutional right; therefore (C) is inapplicable. Petitioner does not allege a delay in discovering his claim; therefore, (D) is inapplicable.

The date the judgement became final by conclusion of direct review or expiration of time for seeking direct review triggered the statute of limitations for Petitioner's claim. **See** 28 U.S.C.§2244(d)(1)(A). Under Texas law, a petitioner's conviction become final when time for filing an appeal expires thirty days after the judgement. TEX.R.APP. P. 41(b)(1). The trial court imposed the challenged sentence on May22,1996. Petitioner did not file an appeal. Petitioner's time to seek review of the judgement expired on June21,1996. Petitioner had to file the § 2254 motion before June21,1997.

The statute of limitations is tolled, however, by properly filed state applications for writ of habeas corpus. If Petitioner filed the first state application for writ of habeas corpus on October22,1996, there were two-hundred-forty-two days left before the statute of limitations would run. When the court denied the application on January29, 1997, the statute of limitations recommenced with two-hundred-forty-two days left before the statute of limitations would run. The statute of limitations ran on September

26,1997, before Petitioner filed the present application; therefore, Petitioner's application is barred by the statute of limitations pursuant to 28 U. S.C. § 2244(d).

The Texas Court of Criminal Appeals dismissed Petitioner's second state application for writ of habeas corpus for abuse of writ. Consequently, the application was not filed properly.

Only properly filed applications toll the statute. 28 U.S.C.§2244(d)(2). Petitioner's second application was not filed properly; therefore, it did not toll the statute of limitations.

Recommendation

It is therefore recommended that the Court dismiss Petitioner's application as barred by the statute of limitations pursuant to 28 U.S.C.§2244(d).

Within ten days after receiving the magistrate's judges report, any party may serve and file written objections to the findings and recommendations.

A party's failure to timely file objections bars that party from **de novo** review by the district judge of those findings, conclusions, and recommendations and, except on grounds of plain error, from appellate review of the unobjected-to findings and conclusions which the district court accepted and adopted. **Douglass v. United Servs. Auto Ass'n,** 79 F.3d 1415, 1430 (5th Cir. 1996) (en banc).

SIGNED this 15th day of January, 1999.

/s/ Harry W. McKee
UNITED STATES MAGISTRATE JUDGE

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* A timely objection was made. However, the district judge adopted the recomendations.

APPENDIX C

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS
OF TEXAS P.O. BOX 12308 CAPITAL STATION
AUSTIN TEXAS 78711

RE: Writ No. 32,716-07

STYLE: Timothy George Fergason

TRIAL COURT: F-96-15-7/4-C

July 29,1998

This is to advise that the Court has dismissed without written order the subsequent application for writ of habeas corpus. See Art. 11.07, Sec. 4, V.A.C.C.P.

POST MARKED
AUSTIN,TX
NOV29'99

Timothy George Fergason
TDC# 746910
026 Pack I Unit
Rt. 3 Box 300
Navasota, Texas 77868

APPENDIX D

NO. F-96-015-7/4-A

RESPONSE TO APPLICATION FOR WRIT OF HABEAS CORPUS

Comes now the STATE OF TEXAS and makes this response to Applicant, TIMOTHY GEORGE FERGASON'S Application for Writ of Habeas Corpus and would show the Court as follows:

I.

The Applicant was convicted and sentenced in the 114th Judicial District Court to eighteen (18) years confinement in the State penitentiary for Felony DWI, in Cause Number F-96-015-7/4-A.

II.

The State denies each and every claim that the Applicant presents.

III.

Applicant claims he was not informed of the charge against him and sets forth what he says is the indictment. Applicant left out the two misdemeanor DWI's and one Aggravated Assault of a Peace Officer that were included in the indictment. The first DWI was committed on January 2, 1996, and became final conviction before the commission of the second DWI, which was committed on May 30, 1996, which became

final before the charged offense of Felony DWI was committed on July 19, 1994.

Applicant signed the stipulation of evidence, he simply failed to include the page containing the signature in this application.

WHEREFORE, PREMISES CONSIDERED, the STATE OF TEXAS respectfully requests that Applicant's Application for Writ of Habeas Corpus be DENIED.

Respectfully submitted,

/s/"Edward J. Marty"
EDWARD J. MARTY, Assistant
Criminal District Attorney
403 Smith County Courthouse
Tyler, Texas 75702
903/535-0520
State Bar Number 13144765

Certificate of Service

I hereby certify that a true and correct copy of the foregoing Response to Application for Writ of Habeas Corpus has been sent to Timothy George Fergason, TDCJID# 746910, Rt. 3 Box 300, Navasota, Texas 77869, on this the 2nd day of December, 1996.

/s/ "Edward J. Marty"
EDWARD J. MARTY, Assistant
Criminal District Attorny

FILED
BRAD BURGER
'96 DEC 02
Clerk, Smith
County, Texas

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-40356

[September 29, 1999]

TIMOTHY G FERGASON

Petitioner-Appellant

v.

GARY L. JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION

Respondent-Appellee

Appeal from the United States District Court
for the Eastern District of Texas, Tyler

Before Politz, Jolly, and Wiener, Circuit Judges.

BY THE COURT:

A member of this panel has previously denied appellant's motion for certificate of appealability. After consideration by this panel upon request of appellant, **IT IS ORDERED** that appellant's petition for panel rehearing with suggestion for rehearing

en banc treated as motion for reconsideration is "denied".

*There are two sets of initials that are unidentifiable.

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FILE STAMPED
U.S. COURT OF APPEALS
FILED
SEP 29 1999
CHARLES R. FULBRUGE III
Clerk

~~~~~~~~~~~~~~~~~~~~~~

MOT-29

APPENDIX F

Cause no. 96-015-4

THE STATE OF TEXAS	§	IN THE 114TH JUDICIAL
vs.	§	DISTRICT COURT OF
TIMOTHY GEORGE FERGASON		SMITH COUNTY, TEXAS

CERTIFICATE - WRIT OF HABEAS CORPUS

BE it remembered that:

(a) On the 6 day of October , 1996, this Court received an application for post-conviction Writ of Habeas Corpus, a copy of which is attached hereto, which was assigned to this Court by the Clerk and assigned the above numbered and entitled cause of action.

(b) On the 2 day of December ,1996, this Court forwarded a copy of this application to the State's attorney by certified mail, return receipt requested, or has executed a Waiver of Service, a copy of which is attached hereto.

(c) State's counsel

( ) has not filed an answer within 15 days, or has executed a statement of intent not to file an answer; or

(X) has timely filed an answer, a copy of which is attached hereto.

(d) The Court after review of the petition, any answer, and the file, finds and determines that there are no controverted, previously unresolved facts material to the legality of the Defendant's confinement.

(e) The Court orders the Clerk if this Court to imm-

ediately transfer to the Court of Criminal Appeals:

1) a copy of the petition;
2) any answer filed and waivers executed by the State;
3) this certificate.

Signed and Certified on this the 3 day of December, 1996.

/s/ Cynthia Stevens Kent

HONORABLE CYNTHIA STEVENS KENT

Judge, 114TH District Court

Smith/Wood County, Texas

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FILE STAMPED

DEC03'96

Clerk, Smith County, Texas

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APPENDIX G

INDICTMENT

THE STATE OF TEXAS **IN THE 7TH DISTRICT COURT**
VS **OF**
TIMOTHY GEORGE FERGASON **SMITH COUNTY TEXAS**

CHARGE: Driving While Intoxicated **Article:** 6701L-1
Control#: 9601024

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF TEXAS: THE GRAND JURORS, duly selected, organized, sworn and impanled as such for said County, Smith State of Texas, at the January-June Term, 1996, of the 7th Judicial District Court of Said County, a quorum therefore being present, upon their oaths present in and to said Court that on or about the 23rd day of December, 1995, and anterior to the presentment of this indictment, in the County of Smith, State of Texas, TIMOTHY GEORGE FERGASON did then and there drive and operate a motor vehicle in a public place while intoxicated, to-wit: when TIMOTHY GEORGE FERGASON did not have the normal use of his mental and physical faculties by reason of the introduction of alcohol into the body of TIMOTHY GEORGE FERGASON;

AND THE GRAND JURORS AFORESAID, upon their oaths aforesaid, do further present in and to said Court that on or about the 23rd day of December, 1995, and anterior to the presentment of this indictment, in the

County and State aforesaid, TIMOTHY GEORGE FERGASON did then and there drive and operate a motor vehicle in a public place while intoxicated, to-wit: when TIMOTHY GEORGE FERGASON had an alcohol concentration of at least 0.10;

And it is further presented in and to said Court that, prior to the commission of the offense hereinabove, alleged committed on or about the 23rd day of December 1995, by the said TIMOTHY GEORGE FERGASON, on the 30th day of May, 1988, in the County Court at Law of McLennan County, Texas, in Cause No. 860-621CR1, the said TIMOTHY GEORGE FERGASON was convicted of the offense of driving while intoxicated and operating a motor vehicle in a public place while intoxicated, a misdemeanor;

And it is further presented in and to said Court that, prior to the commission of the offense hereinabove, alleged committed on or about the 23rd day of December, 1995, by the said TIMOTHY GEORGE FERGASON, on the 2nd day of January, 1986, in the County Court at Law of McLennan County, Texas, in Cause number 85-3295CR1, the said TIMOTHY GEORGE FERGASON was convicted of the offense of driving and operating a motor vehicle in a public place while intoxicated, a misdemeanor.

AND THE GRAND JURORS AFORESAID, do further further [sic] present in and to said Court that, prior to the commission of the offense in the First Paragraph by the said TIMOTHY GEORGE FERGASON, to-wit: on the 12th day of June, 1993, in the 54th Judicial District Court of McLennan County, Texas, in Cause Number 86-969-C, the said TIMOTHY GEORGE FERGASON was finally convicted of the felony offense of Aggravated Assault on a Peace Officer.

AGAINST THE PEACE AND DIGNITY OF THE STATE.

" Name Illegible "

Foreman of the Grand Jury

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FILED BY
BRAD BURGER
1996 Jan 11 PM
1:48
/s/ By Deputy

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APPENDIX H

INDICTMENT

THE STATE OF TEXAS **IN THE 114TH DISTRICT COURT**
VS **of**
TIMOTHY GEORGE FERGASON **SMITH COUNTY, TEXAS**

CAHRGE: Driving While Intoxicated **ARTICLE:** 6701l-01
CONTROL#: 9408-484

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF TEXAS:

THE GRAND JURORS, duly selected, organized, sworn and impanled such for the county of Smith, State of Texas, at the July-December Term, 1994, of the 114 TH Judicial District Court for said County, a quorum thereof being present, upon their oaths present in and to said Court that on or about the 19th day of July, 1994, and anterior to the presentment of this Indictment, in the County of Smith, State of Texas, TIMOTHY GEORGE FERGASON did then and there drive and operate a motor vehicle in a public place while intoxicated, to-wit: when TIMOTHY GEORGE FERGASON did not have the normal use of his mental and physical faculties by reason of the introduction of alcohol into the body of TIMOTHY GEORGE FERGASON;

And it is further presented in and to said Court that, prior to the commission of the aforesaid offense by the said TIMOTHY GEORGE FERGASON, on the 30th day of May, 1986, in the County Court at Law of McLennan County, Texas, in Cause Number 860621CR1, the said TIMOTHY GEORGE FERGASON was convicted of the offense of driving and operating a motor vehicle in a public place while intoxicated, a misdemeanor, and said conviction became final prior to the commission of the aforesaid offense;

And it is further presented in and to said Court that prior to the commission of the aforesaid offense in the first paragraph by the said TIMOTHY GEORGE FERGASON, on the 2nd day of January, 1986, in the County Court at Law of McLennan County, Texas, in Cause Number 853295CR1, the said TIMOTHY GEORGE FERGASON was convicted of the offense of driving and operating a motor vehicle in a public place while intoxicated, a misdemeanor, and said conviction became final prior to the commission of the offense stated in the first paragraph above;

AND THE GRAND JURORS AFORESAID, do further present that prior to the commission of the aforesaid offense in the First Paragraph by the said TIMOTHY GEORGE FERGASON, to-wit: on the 12th day of June, ~~1993~~,1987 csk* in the 54TH Judicial District Court of McLennan County, Texas, in Cause Number 86-969-C, the said TIMOTHY GEORGE FERGASON was finally convicted of the felony offense of Aggravated Assault on a Peace Officer;

AGAINST THE PEACE AND DIGNITY OF THE STATE.

/s/ " Larry Williams "

Foreman of the Grand Jury

* This date was interliniated by hand on the day of trial by the judge: Cynthia Stevens Kent

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FILED
BRAD BURGER, CLERK
94 OCT 6, PM 4:55
Smith County, Texas
/s/ By Deputy

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APPENDIX I

NO. 96-015-4

[April 22, 1996]

THE STATE OF TEXAS	**§**	**IN THE 114TH JUDICIAL**
VS	**§**	**DISTRICT COURT OF**
TIMOTHY GEORGE FERGASON	**§**	**SMITH COUNTY, TEXAS**

STIPULATION OF EVIDENCE

My name is TIMOTHY GEORGE FERGASON, and I am the Defendant in the above entitled and numbered cause appearing in person with my attorney present. I hereby consent in writing and in open court to the stipulation of evidence in this case and in so doing expressly waive the appearence, confrontation and cross-examination of witnesses. I further consent to the introduction of hearsay testimony by affidavit, written statements of witnesses and other documentary evidence, accordingly, having waived my Federal and State constitutional and statutory right against self-incrimination, I agree to stipulate that the following facts are true and correct and constitute the evidence in this case., that in the County of Smith, State of Texas, on the 23rd day of December, 1995, and anterior to the presentment of the indictment, in the County and State aforesaid, I, TIMOTHY GEORGE FERGASON, did then and there drive and operate a motor vehicle in a public place, to-wit: a public road and highway, while intoxicated, when

TIMOTHY GEORGE FERGASON did not have the normal use of his mental and physical faculties by reason of the introduction of alcohol into the body of TIMOTHY GEORGE FERGASON;

AND THE GRAND JURORS AFORESAID, upon their oaths aforesaid, do further present in and to said Court that on or about the 23rd day of December, 1995, and anterior to the presentment of this indictment, in the County and State aforesaid, TIMOTHY GEORGE FERGASON did then and there drive and operate a motor vehicle in a public place while intoxicated, to-wit: when TIMOTHY GEORGE FERGASON had an alcohol concentration of at least 0.10;

And it is further presented in and to said Court that, prior to the commission of the offense hereinabove alleged committed on or about the 23rd day of December, 1995, by the said TIMOTHY GEORGE FERGASON, to-wit: on the 30th day of May, 1986, in the County Court at Law of McLennan County, Texas in Cause Number 860621CR1, the said TIMOTHY GEORGE FERGASON was convicted of the offense of driving and operating a motor vehicle in a public place while intoxicated, a misdemeanor;

And it is further presented in and to said Court that,

prior to the commission of the offense hereinabove alleged committed on or about the 23rd day of December, 1995, by the said TIMOTHY GEORGE FERGASON, to-wit: on the 2nd day of January, 1986, in County Court at Law of McLennan County, Texas in Cause Number 853295CR1, the said TIMOTHY GEORGE FERGASON was convicted of the offense of driving and operating a motor vehicle in a public place while intoxicated, a misdemeanor;

AND THE GRAND JURORS AFORESAID, do further present in and to said Court that, prior to the commission of the offense in the First Paragraph by the said TIMOTHY GEORGE FERGASON, to-wit: on the ~~12th day of June, 1993,~~ in the 54th Judicial District Court of McLennan County, Texas, in Cause Number 86-969-C, the said TIMOTHY GEORGE FERGASON was finally convicted of the felony offense of Aggravated Assault on a Peace Officer;

Initials: T.G.F. B.E.B.

^^[interliniated **"6th day of March, 1987 C.M.S."** Initialed: by judge]

AGAINST THE PEACE AND DIGNITY OF THE STATE.

"Tim G. Fegason"
Defendant

"Barry E. Bilger "
Attorney for Defendant

SUBSCRIBED AND SWORN TO BEFORE ME, the undersigned authority, on the 22 day of April , 1996, by the above named Defendant in open court during the trial of the above numbered and entitled cause.

R. Brad Burger, Clerk of the District Court, Smith County, Texas
By: "Illegible Signature"
Deputy Clerk

"Cynthia S. Kent"
Judge Presiding

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

TIMOTHY FERGASON	§	
V.	§	CIVIL ACTION NO. 6:97cv778
DIRECTOR, TDCJID	§	

REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE

The petitioner Timothy Fergason, an inmate of the Texas Department of Criminal Justice, Institutional Division proceeding pro se, filed this application for the writ of habeas corpus under 28 U.S.C. §2254 complaining about the propriety of the calculation of his sentence. The petition was referred to the undersigned United States Magistrate Judge pursuant to 28 U.S.C. 636 (b)(1) and (3) and the Amended order for the Adoption of Local Rules for the Assignment of Duties to United States Magistrates.

The Director of TDCJ-ID was ordered to answer the oetition and filed his answer on October 15, 1997. This answer states that Fergason raises five issues in his petition, of which four have been presented to the highest court of the State of Texas. However, the Director says, the fifth issue has not been raised in the State courts.

A state prisoner must exhaust all available state court remedies before he can obtain federal habeas

corpus relief unless circumstances exist which render the state corrective process ineffective to protect the prisoner's rights. 28 U.S.C. 2254 (b)& (c); see **Satterwhite v. Lynaugh**, 886 F.2d 90, 92 (5th Cir.1989). In order to exhaust, a petitioner must "fairly present" all of his claims to the state court. **Picard v. Connor**, 404 U.S. 270 (1981).

Further, it is necessary for the claim presented to the federal court to have first been presented to and ruled on by the highest state court, which in Texas is the Court of Criminal Appeals. **Richardson v. Procunier**, 762 F.2d 429 (5thCir.1985). This may be accomplished, for example, by filing a petition for the writ of habeas corpus in the convicting court pursuant to Article 11.07 of the Texas Code of Criminal Procedure.

The Fifth Circuit has held that to exhaust state remedies, a habeas petitioner must fairly apprise the highest court of his state of the federal rights which were allegedly violated. **Shute v. State of Texas**, 113 F3d 56 (5thCir.1997). A federal habeas corpus petitioner fails to exhaust his sta-

te remedies when he relies on a different legal theory than he did in state court or when he makes the same legal claim to a federal court but supports the claim with factual allegations that he did not make to the state courts. **Dispensa v. Lynaugh**, 847 F2d 211, 217 (5thCir.1987); see also **Knox v. Butler**, 884 F2d 849, 852 n.7 (5thCir.1989), cert. denied 110 S.Ct. 1828 (1990).

In this case, Fergason has exhausted some, but not all, of the issues which he seeks to raise in this Court. The Supreme Coourt has held that when a petitioner fails to exhaust his state court remedies fully, the petition must be dismissed. See **Rose v. Lundy**, 455 U.S. 209 (1982); accord, **Thomas v. Collins**, 919 F2d 333 (5thCir.1990), reh. den. (habeas petition must be dismissed if any issue has not been exhausted in state courts). Thus, Fergason's petition may be dismissed without prejudice for failure to exhaust state remedies. **Murphy v. Collins**, 110 F3d 10, 11-12 (5th Cir.1997). In the event that Fergason does not obtain relief from the highest court of the State of Texas concerning all of the claims which he

seeks to present, he may refile his petition at that time.

RECOMMENDATION

It is accordingly recommended that the petitioner's application for the writ of habeas corpus be dismissed without prejudice for failure to exhaust state remedies.

A party's failure to file objections to the findings, conclussions and recommendations contained in this Report within ten days after service with a copy thereof shall bar that party from de novo review by the district judge of those findings, conclussions and recommendations and, except upon grounds of plain error, from appellate review of the unobjected-to factual findings and legal conclussions accepted and adopted by the district court. **Douglass v. United Services Automobile Association**, 79 F3d 1415, 1430 (5th Cir.1996) (en banc).

SIGNED this 3rd day of November, 1997.

/s/ "Harry W. McKee"
HARRY W. McKEE
UNITED STATES MAGISTRATE JUDGE

FILED
U.S. DISTRICT COURT
NOV-41997
David J. Maland, Clerk

APPENDIX K

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

TIMOTHY G. FERGASON	§	
VS.	§	Civil Action No. 6:98cv662
GARY M. JOHNSON, DIRECTOR	§	
TDCJ-ID	§	

SHOW CAUSE ORDER

Petitioner's application for writ of habeas corpus pursuant to 28 U.S.C.§2254, filed in the above styled cause, was referred to the undersigned United States Magistrate Judge for consideration. The Court is of the opinion that Petitioner states one or more factual allegations which, if true, state a cause of action pursuant to 28 U.S.C.§2254. The Court therefore

ORDERS that Respondent has 40 days in which to either show cause why the court should not grant Petitioner's application for writ of habeas corpus or otherwise plead. See Fed. R. Civ. P. 81(a)(2). Petitioner alleges ineffective assistance of counsel as a ground for relief; therefore, the answer should include an affidavit from Petitioner's trial counsel in response to such claims. The clerk of Court shall serve a copy of the petition on the attorney General of the State of Texas. See RULES GOVERNING SECTION 2254 PROCEEDINGS IN UNITED STATES DISTRICT COURTS 4.

Signed this 4th day of November, 1998.

/s/ "Harry W. McKee"
HARRY W. McKEE
UNITED STATES MAGISTRATE JUDGE

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FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF TEXAS
NOV - 4 1998
David J. Maland, Clerk

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APPENDIX L

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

TIMOTHY G. FERGASON	§	
VS.	§	Civil Action No. 6:98cv662
GARY M. JOHNSON, DIRECTOR	§	
TDCJ-ID	§	

ORDER DENYING PETITIONER'S
MOTION FOR RECONSIDERATION

Petitioner Timothy G. Fergason, an inmate confined in the Pack 1 Unit of the Texas prison system seeks to challenge Petitioner's conviction pursuant to 28 U.S.C.§2254. On February 4, 1999, this Court issued a final judgement dismissing the above-styled and numbered case.

On January 29, 1999, Petitioner filed objections to the magistrate judge's Report and Recommedation. Petitioner's objections assert that Petitioner pled guilty rather than being convicted by a jury and that the filing of his second state application for writ of habeas corpus tolled the statute of limitations pursuant to 28 U.S.C.§2244. Petitioner's assertion regarding the guilty plea is correct; however, it has no effect on the dismissal of his federal application for writ of habeas corpus pursuant to

28 U.S.C.§2244.

On February 11, 1999, Petitioner filed a motion for new trial. The motion asserts that this Court should reconsider his case because this Court did not address Petitioner's objections to the magistrate judge's Report and Recommendation.

On February 18, 1999, Petitioner filed a motion for reconsideration of the final judgement dismissing the case. Petitioner asserts that the filing of his second state application for writ of habeas corpus tolled the statute of limitations pursuant to 28 U.S.C.§2244. Petitioner's second application was dismissed for abuse of the writ, but Petitioner asserts that he "was under the impression that since the State had not addressed his claims on the merit of those claims he could return and restate them." Petitioner's misunderstanding does not change the fact that the second application was not properly filed and therefore did not toll the statute of limitations.

This Court has conducted a **de novo** review of Petitioner's objections, motion for reconsideration, and motion for new trial and determined they lack merit. This Court therefore

ORDERS that Petitioner's motion for reconsideration (Dkt.#14) is **DENIED**; and

ORDERS that Petitioner's motion for new trial (Dkt.#13) is **DENIED.**

SIGNED this 25th day of February, 1999.

/s/ "John Hannah Jr."
JOHN HANNAH, JR.
UNITED STATES DISTRICT JUDGE

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FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF TEXAS
FEB 25 1999
David J. Maland, Clerk

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Prepared By: David C. Bolton